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No. 85-713

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

GUSTAV E. BEERLY, TRUSTEE, ETC., PETITIONER

v.

DEPARTMENT OF THE TREASURY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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Petitioner, a dissenting shareholder in a bank merger, challenges the appraisal of his shares made by the Comptroller of the Currency pursuant to 12 U.S.C. 215a.

1. Petitioner, as trustee, held approximately three percent of the stock of Mid-City National Bank of Chicago (the bank) (Pet. 3 n.1). In 1982, the bank was merged into Mid-City Bank, N.A., which immediately became a subsidiary of a newly-formed bank holding company (Pet. App. A4, D3). The initial merger required and obtained the approval of the Comptroller of the Currency under 12 U.S.C. 215a (Pet. App. A4). This statute also provides that a shareholder dissenting from the merger may receive the "value" of his shares (12 U.S.C. 215a(b)); petitioner, who did dissent, accordingly availed himself of this mechanism. "Value" is determined by a committee of three appraisers, one of whom is chosen by the receiving bank, one by the

dissenters, and the third by the first two appraisers (Section 215a(c)). Where, as here, the first two appraisers are unable to agree upon a third or are otherwise unable to agree upon a valuation, the statute provides for a binding appraisal by the Comptroller (Section 215a(d)). Petitioner invoked this provision, requesting such an appraisal (Pet. App. A4).

The receiving bank and the dissenting shareholders made written submissions to the Comptroller, supporting their differing valuations of the stock (Pet. App. A4). After reviewing those submissions, and considering several alternative methods of stock valuation, the Comptroller issued his appraisal, valuing the stock at $282.39 per share (*id.* at E1-E11). Petitioner, dissatisfied with the appraisal, brought an action under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, for review of the Comptroller's action, claiming inter alia that the appraisal was arbitrary and capricious and that it deprived him of property without due process (Pet. App. D2). The district court granted the Comptroller's motion for summary judgment, finding his decision reasonable and the procedures used appropriate (*id.* at D1-D11). The Seventh Circuit unanimously affirmed (*id.* at A1-A14).

2. Petitioner has presented no reason why this factbound case warrants review by this Court. Petitioner himself points out that this case is "one of first impression" in the courts of appeals (Pet. 5), and he does not claim any inconsistency between the court of appeals' holding here and that of the only other reported case challenging a similar appraisal, *Simonds* v. *Guaranty Bank & Trust Co.*, 492 F. Supp. 1079 (D. Mass. 1979) (involving the "essentially analogous" 12 U.S.C. 214a (492 F. Supp. at 1082)). The paucity of litigation in this area (see Pet. App. A3-A4) itself argues against this Court's granting review.

The decision below is, in any event, correct.

a. Petitioner's principal contention is that the Comptroller chose the wrong method of valuing his stock, and that calculating a pro rata share of the bank's liquidated value is the only proper method (Pet. 6-9). There is no support for this proposition, however, in either the statute or its legislative history. The statute merely states that a dissenting shareholder is "entitled to receive the value of the share so held by him," and that the Comptroller shall, in cases such as this, "cause an appraisal to be made which shall be final and binding on all parties" (12 U.S.C. 215a(b), 215a(d)). The legislative history in no way narrows this broad mandate or gives dissenting shareholders the right to any particular valuation method. On the contrary, it states that the statute "has but one object, and that is to simplify the consolidation of existing national banks * * *" (H.R. Rep. 408, 65th Cong., 2d Sess. 1 (1918) (set out at Pet. App. G3)). And, of course, the agency's interpretation of its own statute merits deference. See *Martin* v. *Kilgore First Bancorp, Inc.*, 747 F.2d 1024, 1027 (5th Cir. 1984), cert. denied, No. 84-1582 (May 28, 1985).

Thus, the task of the Comptroller is to ascertain, using the method he deems most appropriate under the particular circumstances of each case, the value of the dissenters' shares. As the court of appeals recognized (Pet. App. A6), review of this essentially factual determination is necessarily deferential, and the Comptroller's decision must be upheld unless it was "arbitrary, capricious, [or] an abuse of discretion" (5 U.S.C. 706(2)(A); see *Camp* v. *Pitts*, 411 U.S. 138, 141-142 (1973)). Petitioner does not challenge this standard.

As the court of appeals then explained at length (Pet. App. A6-A12), the Comptroller's determination—which even petitioner seems to admit reflected "conventional

approaches to valuation" (Pet. 8)—plainly passes muster under this standard. Petitioner's repeated protests that the Comptroller's method of valuation "disadvantages dissenters" and "victimiz[es] * * * the minority" (Pet. 5, 8) are baseless. Petitioner could have received exactly what the majority shareholders received—shares in the new bank—but chose instead to take the cash value of those shares under the statutory appraisal provisions. The relief petitioner seeks—a pro rata share of a speculative liquidation value of the bank—has not been available to any other shareholder. He presents no cogent reason why a Congress that sought to facilitate bank mergers would provide such uniquely favorable treatment for dissenting shareholders, or why it would award minority shareholders a premium for something (*i.e.*, control of the corporation) they by definition do not have (see, *e.g.*, Pet. 7). There is, in any event, certainly no reason to suppose that petitioner's particular method of valuation was mandated by Congress.

b. The court of appeals also properly disregarded petitioner's contentions (Pet. 9-10) regarding the payment of interest during the period of appraisal and judicial review. Petitioner raised this issue for the first time in his reply brief and, regardless of the merits of the issue, the Seventh Circuit has duly adopted a rule specifically providing that "[a] reply brief shall be limited to matter in reply" (7th Cir. R. 9(e); see *Christmas* v. *Sanders*, 759 F.2d 1284, 1292 (7th Cir. 1985)). Petitioner does not deny that he failed to make any mention of this issue in his principal brief below.[1] There is no violation of due process when a federal court merely

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[1]Petitioner claims (Pet. 12-13) that he raised the issue in the district court, but this is irrelevant if he did not raise it on appeal. Moreover, it is doubtful that the issue was pursued even in the district court (see Bank Respondents' Brief in Opposition 6), which did not mention it in its opinion.

enforces its own—entirely reasonable and necessary—procedural rules, even when such enforcement precludes issues that might otherwise have been raised. See *Thomas* v. *Arn*, No. 84-5630 (Dec. 4, 1985).

In any event, there is no merit to petitioner's claim that Congress, in enacting Section 215a without provision for interest during the appraisal and judicial review period, effected an unconstitutional taking of property. Petitioner cites no authority for his constitutional argument, and says only that "[o]ther appraisal statutes" have taken a different approach (Pet. 10). But there is nothing unusual, much less unconstitutional, about a legal rule that declines to provide litigants with interest for the time prior to final administrative or judicial resolution of an issue. See, *e.g.*, *Banks* v. *Pan American World Airways, Inc.*, 763 F.2d 1399, 1401 (11th Cir. 1985) (upholding decision of CAB not to award prejudgment interest to furloughed airline employees); *In re Air Crash Disaster Near Chicago, Illinois on May 25, 1979*, 644 F.2d 633, 637-638 (7th Cir. 1981) (federal court must, in diversity case, follow state rule regarding prejudgment interest). Nor, similarly, is there a constitutional requirement that, if Congress provides for prejudgment interest under one statute, it must provide for it under all.

c. Finally, there is no constitutional requirement here for an evidentiary hearing (see Pet. 10-13). Even concluding, as the court of appeals did (Pet. App. A12), that the "forced exchange" at issue here would constitute an unconstitutional deprivation unless accompanied by due process, the Comptroller's procedures plainly provided "the process that is due in these circumstances." *Greenholtz* v. *Inmates of the Nebraska Penal & Correctional Complex*, 442 U.S. 1, 12 (1979); see *Mathews* v. *Eldridge*, 424 U.S. 319 (1976). As the court of appeals pointed out (Pet. App. A12-A13), the valuation of stock has traditionally been carried out without oral hearings, since it generally involves no questions

(such as, for instance, witness credibility) that would make such a hearing necessary. Petitioner here, indeed, does not challenge the specific factual premises of the Comptroller's valuation, but rather the methods he used in reaching the ultimate result; thus, it is not clear what petitioner contends he was denied the opportunity to present. The procedures used by the Comptroller, under which he weighed petitioner's written submissions along with other available evidence and issued a written appraisal specifying how he reached his decision, afforded petitioner ample process and opportunity to be heard. Under comparable circumstances, numerous courts have recognized that an oral hearing is not a constitutional requirement.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
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[2]See *Gray Panthers* v. *Schweiker*, 716 F.2d 23, 35-36 (D.C. Cir. 1983) (no need for oral hearings for determinations regarding Medicare benefits in the absence of issues of veracity or credibility); *C&H Transportation Co.* v. *ICC*, 704 F.2d 834, 848 (5th Cir. 1983) (ICC certification); *Erco Industries Ltd.* v. *Seaboard Coast Line R.R.*, 644 F.2d 424, 431-432 (5th Cir. 1981) (grant of summary judgment without oral argument); *Basciano* v. *Herkimer*, 605 F.2d 605, 610-611 (2d Cir. 1978), cert. denied, 442 U.S. 929 (1979) (disability determinations involving medical evidence); see generally Friendly, "*Some Kind of Hearing*," 123 U. Pa. L. Rev. 1267, 1281 (1975).